No. 15003

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, AFL, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Labor Relations Board for enforcement of its order issued August 15, 1955, against respondent, herein called Local 12. The Board's decision and order (R. 25-39)[1] are reported at 113 NLRB No. 67. This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), the unfair labor practices having occurred in and around Los Angeles, California, within this judicial circuit.

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[1] References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings and later references are to the supporting evidence.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Local 12 together with other construction trade unions has a collective bargaining agreement with Associated General Contractors, herein called AGC (R. 29; 51). Under this agreement Local 12 is authorized to dispatch certain classifications of workmen for employment with the building and construction contractors who comprise the membership of AGC (R. 30-31; 56, 151-153).[2] The legality of the agreement as such is not in issue. The Board found, however, (R. 39-40), that Local 12 discriminatorily operated the dispatch system in violation of Section 8 (b) (1) (A) and (2) of the Act by giving preference in job referrals to Local 12 members, by requiring non-union applicants for jobs to apply for membership in Local 12 immediately upon their first job referral, and by imposing a weekly permit fee on non-union members when working in its jurisdiction with the AGC unit. The Board found an additional violation of the cited statutory provisions in Local 12's removal of Holderby's name from the preferred list of employee applicants because of his expulsion from Local 12 (R. 40). The evidence in support of the Board's findings is briefly summarized.

A. *The dispatch system set forth in the agreement*

At all times relevant the collective bargaining agreement between Local 12 and its sister unions on the

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[2] The parties stipulated before the Board that the testimony in an earlier proceeding relating to the business of AGC be considered as part of the record in the instant case (R. 28). That testimony established that AGC members during 1953 and 1954 did several million dollars worth of construction work at national defense installations, thus affording ample basis for the Board's assertion of jurisdiction here (*ibid.*).

one hand and AGC on the other contained in Article II-A an exclusive recognition clause, a recital of the employers' freedom to hire and discharge employees subject to the conditions imposed by the agreement, and a union-security clause requiring employees of AGC members covered by the agreement to become members of the appropriate local union not more than thirty days after being employed (R. 29-30; 150-151).[3] Following these provisions, Article II-B sets up a dispatch system in the following terms (R. 30-31; 151-152):

> B. That in the employment of workmen for all work covered by this Agreement in the territory above-described, the following provisions, subject to the conditions of Article II-A, above shall govern:
>
> 1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.
>
> That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled me-

[3] The union-security clause conforms, so far as appears, with the limitations placed upon such arrangements by Section 8 (a) (3) of the Act. Article II-A of the agreement also states the intention of the parties thereto that a closed shop become operative as soon as permissible under the Act, whether by way of amendment to, or judicial interpretation of, the Act.

chanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have recently been laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors desiring to reemploy the same workmen in the same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.[4]

B. *Local 12's discriminatory operation of the dispatch system*

Pursuant to the collective bargaining agreement, AGC members called Local 12 whenever they required

[4] Article 11-B further provides that if the Local Unions do not within 48 hours after appropriate notice from the Contractors furnish the required workmen, the Contractors are entitled to obtain such workmen from other sources but are to report the names of such workmen to the Local Union having work and area jurisdiction.

operating engineers or other classifications of employees falling under the jurisdiction of that Local (R. 32; 59-60). As indicated in the preceding section, the agreement gave first priority in job referrals to workmen who had recently been laid off or terminated and whom the employer wanted to rehire. Apart from these instances, the agreement gave preference to workmen who had been employed by AGC members during the previous ten years as against other applicants for employment.

The practice of Local 12 under this agreement, however, was to maintain two separate categories of workmen who were out of work and available for dispatch. The first category, headed "Members," included all members of Local 12 who were seeking work whether or not they had worked for AGC members during the previous ten years; the second category, denominated "Applicants and Others," included members of sister locals of Local 12 who had transferred into the geographical area covered by Local 12 as well as nonunion members who applied to Local 12 for dispatch (R. 32; 68-69, 72-73). When an employer called in for workmen, Local 12 would first check the "Members" list for workmen having the required skills and the individual longest out of work would be dispatched (R. 33; 72-73).[5] Only if that list contained no qualified workmen would Local 12 resort to the "Applicants and Others" list (R. 33; 69, 72).

In addition, notwithstanding that applicants referred

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[5] An employer's request for the return of a specific workman would be honored regardless of his position on the "Members" list (R. 35). McNeel, the Local 12 representative, could not recall any instance, however, where a specific man on the "Applicants and Others" list was requested or dispatched as against qualified workmen on the "Members" list (*ibid.*).

for employment had, under the terms of the agreement, thirty days in which to join the Union, Local 12 required non-union applicants to apply for membership in Local 12 immediately upon their first referral and required further that they pay a weekly work permit fee (R. 33-34; 134-135, 154-155). This practice was pursuant to the controlling provisions in the constitution of Local 12's parent International Union, under which no non-union workman could be dispatched for employment unless he were an applicant for membership in the International, and unless he paid a permit fee of at least two dollars (R. 33, n. 3; 154-155).[6]

Upon the foregoing facts the Trial Examiner concluded (R. 13-14) that the preference in employment referrals given workmen on the "Members" list as against those on the "Applicants and Others" list was not inconsistent with the terms of the agreement and was not discriminatory under the Act. In his view, the requirement of the agreement that all employees of AGC become members of Local 12 after thirty days had the effect of equating former employment and Local 12 membership so that the list of names would be the same whether it was compiled on the basis of former employment or on the basis of Local 12 membership (R. 14). The Trial Examiner concluded also that the practice of Local 12 in requiring "Applicants and Others" to apply for membership at the time of their first job referral could not be regarded as proof that such application was a condition precedent to

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[6] On occasion, however, applicants for membership were permitted to report to their jobs without paying any part of the initiation fee technically due when the membership application was submitted (R. 34; 133).

job referral (R. 13). Accordingly, the Trial Examiner recommended dismissal of the complaint (R. 25).

The Board, one member dissenting, reversed the Trial Examiner and found that Local 12 had by the foregoing conduct violated Section 8 (b) (2) and (1) (A) of the Act (R. 35-38, 45-47). The Board differed with the Trial Examiner's conclusion that membership in Local 12 could be equated with prior employment with AGC employers. The Board noted that Local 12 members were given preference whether or not they had ever worked before for AGC members and noted further, as more fully explained below, that Employee Holderby was removed from the preferred "Members" list after his expulsion from Local 12 despite his right to preference under the agreement as a former employee (R. 36). The Board also rejected the Trial Examiner's conclusion that the Local 12 practice of requiring a membership application from non-union members immediately upon their first job referral was not a condition precedent to obtaining employment and that this practice, dictated by the constitution of the parent International Union, could be explained on the theory that all applicants voluntarily applied for such membership immediately (R. 36-37). Finally, the Board found that Local 12's practice of extracting a weekly work permit fee from non-members of Local 12, though likewise dictated by the constitution and by-laws, was not authorized by the agreement and constituted a further discrimination in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 38)[7]

[7] The Trial Examiner, while finding that a weekly work permit fee was imposed upon non-members of Local 12, made no finding as to whether this practice was in violation of the Act.

C. *The discrimination against Holderby*

Robert A. Holderby became a member of Local 12 in November 1952 (R. 78). In January 1953 he was suspended for dues delinquency. Pursuant to Holderby's request for reinstatement, Local 12 wrote him under date of March 17, 1953, that he would be reinstated upon payment of certain dues and fees which had accrued. Three months later, however, in June 1953, Local 12 wrote Holderby again, revoking his reinstatement and returning to him all initiation fees, dues, and permit fees which he had theretofore paid (R. 34).[8]

Prior to the June 1953 action of Local 12 rejecting Holderby's request for reinstatement, Holderby's name had appeared on the "Members" list and he had regularly been referred for employment by Local 12 (R. 38; 92, 157-160). Thereafter, however, his name was removed from the preferred "Members" list and placed at the top of the "Applicants and Others" list (R. 38; 89-90, 68). From that time on and for approximately twelve months, Holderby, despite frequent visits to the Local 12 office, was never dispatched to a job although on one or two occasions the Local 12 dispatcher attempted to notify him of a possible referral (R. 34; 93-95). For about four months during this period Holderby was employed as a truck salesman working on commission (R. 34-35; 103-104). Even during these months, however, Holderby was available for work as an operating engineer and throughout the entire period he made earnest, albeit unsuccessful, efforts to obtain

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[8] The letters herein referred to were admitted into evidence as part of General Counsel's Exhibit 6 (R. 86-87). Since the text of these letters is set forth in the Intermediate Report (R. 15-17), the exhibit has not been reproduced in the Record.

construction work by applying to Local 12 for referrals and by applying personally to contractors (R. 35; 109-112).

On June 3, 1954, two days after the issuance of the complaint herein, Local 12 offered Holderby two jobs and continued to dispatch him fairly regularly until shortly before the hearing, when again the referrals ceased (R. 34; 97, 161).

The Trial Examiner concluded that in order to establish unlawful discrimination against Holderby, "it was incumbent upon General Counsel to prove there were jobs available for employees with Holderby's capabilities and, further, that he, Holderby, was not referred to such jobs" (R. 24). Since in the Trial Examiner's view, such proof was not presented, he concluded that no discrimination against Holderby had been established (*ibid*). The Board, one member dissenting, disagreed with the Trial Examiner. It held that "the mere removal of Holderby's name from the contractual preferred list because he had lost his Union membership was a violation of the Act, and that the extent to which Holderby actually suffered loss of employment is a matter for determination at the compliance stage of the proceeding" (R. 38-39). Denial of equal access to jobs, the Board held, was in itself and without more a restrictive imposition in violation of the Act (R. 39).[8a]

[8a] As the record shows, the findings of fact herein are based on virtually undisputed evidence. The Board's reversal of the Trial Examiner, therefore, springs only from its different view of the law applicable to the facts. In this frame of reference, where credibility is not involved, the Trial Examiner's findings, of course are entitled to no special weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 492, 496; *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9).

II. The Board's Order

The Board's order requires Local 12 to cease and desist from the several unfair labor practices found and from like or related unfair labor practices. Affirmatively, the order requires Local 12 to make Holderby whole for any loss of earnings suffered because of the discrimination and to post appropriate notices (R. 42-45).

SUMMARY OF ARGUMENT

A. Apart from the narrow exception afforded by the union security provisions of Section 8 (a) (3) of the Act, settled law precludes an employer from requiring membership in a labor organization as a condition of employment and likewise precludes a union from causing or attempting to cause an employer to impose such a requirement. Application of these settled principles establishes the propriety of the Board's finding that Local 12 violated Section 8 (b) (1) (A) and (2) of the Act when it made membership in Local 12 a criterion for preference in job referrals. The fact that Local 12 members who had never worked for AGC members before were given preference and that Robert Holderby, on termination of his Local 12 membership, was denied such preference adequately refutes the contention that Local 12 membership could be equated with prior AGC employment experience as a basis for according job referral preference.

Local 12's practice of requiring non-union members to apply for membership in Local 12 immediately upon their first job referral is likewise violative of Section 8 (b) (1) (A) and (2) of the Act. Even under a valid union-security agreement, employees have a thirty-day grace period before they are required to apply for union membership. Local 12's claim that it exercised

no compulsion, but that all non-union workmen voluntarily applied for membership immediately upon their first job referral, is wholly ingenuous. Further indication that such applications were the product of Local 12 compulsion is afforded by the constitution of Local 12's parent International which prohibits its local unions from issuing temporary work permits to anyone not a member of the International or an applicant for membership.

Insofar as Local 12 extracted work permit fees from non-members as against members, it likewise imposed an unlawful condition upon employment. No suggestion is made that the imposition of these fees, authorization for which is also found in the constitution of the parent International, was in any way dictated by or required for the operation of the dispatch system.

The view of the dissenting Board member that no finding of Section 8 (b) (2) violation by Local 12 could be made here because of the absence of evidence showing a violation of Section 8 (a) (3) by AGC is vulnerable on two grounds. In the first place, AGC may not, by delegating its hiring function, evade its statutory obligation to see that hiring is done in a non-discriminatory manner. In the second place, a violation of Section 8 (b) (2) is sufficiently established by "a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a) (3)." *Radio Officers* v. *N. L. R. B.*, 347 U. S. 17, 53.

B. For reasons already stated, the removal of Robert Holderby's name from the list of those preferred for job referrals merely because his Local 12 membership was terminated is plainly violative of Section 8 (b) (1) (A) and (2) of the Act. The deprivation of the prefer-

ence is itself sufficient showing of a violation (see *N. L. R. B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814), and no evidence need be adduced to show that jobs were actually available which Holderby would have received but for the discrimination against him. The latter showing, which is relevant only for purposes of determining the amount necessary to make Holderby whole for lost earnings, is appropriately left for post-decree compliance proceedings.

ARGUMENT

The Board Properly Determined that Local 12's Discriminatory Operation of Its Dispatch System and Its Denial of Job Referrals to Robert Holderby Constituted Violations of Section 8 (b) (1) (A) and (2) of the Act

A. *The discriminatory operation of the dispatch system*

Settled law establishes that, subject to one sharply defined exception, the rights of an employee or an applicant for employment may not be abridged or terminated because of his membership or nonmembership in a labor organization. Sections 7, 8 (a) (3), 8 (b) (2) of the Act.[9] Accordingly, this Court has uniformly held that an employer violates Section 8 (a) (3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. See, e. g. *N. L. R. B.* v. *Swinerton & Walberg Co.*, 202

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[9] The exception to this principle is set forth in the proviso to Section 8 (a) (3) of the Act which provides that an employer and a union may under appropriate circumstances enter into an agreement requiring employees to become members of the union *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is later.* While the collective bargaining agreement between Local 12 and AGC included such a union-security provision, that provision is only indirectly involved in the instant case. See, *infra*, p. 14.

F. 2d 511, 514, certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Cantrall,* 201 F. 2d 853, 855-856, certiorari denied, 345 U. S. 996. This Court has likewise repeatedly held that a union violates Section 8 (b) (2) as well as Section 8 (b) (1) (A) of the Act where, either by written agreement or by practice, it causes or attempts to cause an employer to engage in such discrimination. *N. L. R. B.* v. *ILWU,* 210 F. 2d 581; *N. L. R. B.* v. *ILWU, Local 10,* 214 F. 2d 778; *N. L. R. B.* v. *Waterfront Employers of Washington,* 211 F. 2d 946; *N. L. R. B.* v. *Alaska Steamship Company,* 211 F. 2d 357.

Applying these settled principles to the facts of the instant case, we believe the record establishes beyond cavil the propriety of the Board's finding that Local 12 violated Section 8 (b) (1) (A) and (2) of the Act both in its operation of the dispatch system and in its treatment of Robert A. Holderby pursuant to that system. As already indicated (*supra,* pp. 4-6), the dispatch system put into operation by Local 12 departed widely from the system outlined in the agreement which established a scheme of preferences for job referrals predicated solely on prior employment with AGC members.[10] Thus, Local 12 included in its preferred category for job referrals all members of Local 12 whether or not they had had prior employment with AGC members (*supra,* p. 5). Similarly, Robert A. Holderby, who qualified for preference under the terms of the collective agreement by virtue of his prior employment with AGC members, was dropped from the preferred category once his Local 12 membership terminated. To the extent that this practice departed from the scheme contemplated by the agreement and made Local 12

[10] The legality of that agreement is not in issue in this proceeding. Compare *N.L.R.B.* v. *ILWU,* 210 F. 2d 581, 583, n. 1 (C.A. 9).

membership the criterion for preference in job referrals, it was plainly illegal.[11]

For the same reasons, the Board was warranted in rejecting the Trial Examiner's view, urged by Local 12, that the workmen on its "Members" list corresponded exactly to those who would qualify for preference on the prior employment criterion contemplated by the agreement. This view was predicated on the thesis that by operation of the union security clause in the AGC agreement, all former employees of AGC would necessarily have become Local 12 members after thirty days, and hence eligible for preference under the agreement. Apart from any other infirmity in this line of argument, the view here advanced affords no warrant for the preference accorded members of Local 12 who had never worked for AGC members or the withholding of preference from Holderby whose prior employment by AGC members would in and of itself qualify him for preference under the agreement.

Local 12's practice of requiring non-union members to apply for membership in Local 12 immediately upon their first job referral is likewise in derogation of the Act (*supra,* pp. 5-6). As already noted (p. 12, n. 9), the requirement of union membership as a condition of employment can only be imposed pursuant to a valid union security provision. And even under such a provision, the Act affords employees a thirty-day grace period during which they are exempt from such a requirement. Such a thirty-day provision was incorporated in the AGC agreement. But as in the case of job

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[11] Had the agreement incorporated union membership as criterion for employment preference the agreement itself would have been vulnerable. See *N.L.R.B.* v. *Alaska Steamship Company,* 211 F. 2d 357, 359 (C.A. 9).

referral preference, heretofore discussed, the legality of the contractual arrangement does not exonerate Local 12 from its unlawful departure from that arrangement when it insists on membership applications forthwith. Nor can Local 12 derive any comfort from the suggestion, adopted by the Trial Examiner, that it imposed no such requirement but that all non-union applicants voluntarily applied for membership of their own free will as soon as they received job referral. Such an assumption, we submit, is, at the very least, ingenuous. Moreover, it ignores, as the Board found (R. 37), "the practical situation in which such applicants were placed." Job applicants were aware that their only chance of obtaining employment with AGC members was through Local 12's dispatching office, and the penalties of incurring the disfavor of Local 12 are dramatically shown in its treatment of Robert A. Holderby. Significantly, too, the constitution of Local 12's parent International specifically prohibits a local union from issuing a temporary work permit to anyone who is not either a member of the International or an applicant for membership (*supra,* p.). Under all these circumstances, the Board was amply warranted in concluding that the uniform practice followed by non-union applicants of applying for membership in Local 12 immediately upon their first job referral was no mere happenstance but rather the product of Local 12 compulsion.

The third violation found by the Board consisted in the imposition by Local 12 of a weekly work permit fee on nonunion applicants as a condition of their referral for employment. No such fee was imposed on union members. Here, again, the AGC agreement contained no such provision but the constitution of the Interna-

tional dictated the practice followed by Local 12 (*supra*, p. 7). As the Board noted, "Respondent neither contended nor proved that this special charge levied upon non-union applicants was in any way related to the cost of operating the dispatch system for the benefit of such employees" (R. 38). This disparity of treatment, based as it was on union membership, was plainly violative of Section 8 (b) (1) (A) and insofar as it served to preclude nonholders of work permits from access to employment, it was further violative of Section 8 (b) (2).

It is urged in the dissent that a finding of violation of Section 8 (b) (2) on any of the foregoing grounds is precluded by the literal language of that section (R. 45-47), and that a union violates Section 8 (b) (2) only when it "cause[s] or attempt[s] to cause an employer to discriminate against an employee in violation of subsection (a) (3)." Since the record here demonstrates no more than that AGC entered into an agreement, the legality of which is not challenged, and since no independent evidence of discrimination on the part of AGC is shown, it is argued that a violation of Section 8 (a) (3) is not established and the allegation of a Section 8 (b) (2) violation cannot be sustained.

We submit that this view is vulnerable on at least two separate grounds. In the first place, as the Board found (R. 36, n. 5), AGC may not by delegating its hiring function to Local 12 relieve itself of its primary statutory obligation not to discriminate as to hire or tenure of employment on the basis of union membership. And where it has delegated that function, its responsibility at the very least is to see that the

delegated power is not exercised in a discriminatory manner. To the extent that it fails to carry out that responsibility, it has in a very real sense itself been guilty of discrimination.

In the second place, the Supreme Court noted in *Radio Officers* v. *N.L.R.B.,* 347 U.S. 17, 53, that "a literal reading of [Section 8 (b) (2)] requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a) (3)."[12] An attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) would constitute a violation of Section 8 (b) (2) even if the employer resisted and refused to discriminate. By the same token, a union is not exonerated where it has so successfully masked its true purpose that the employer fulfills the union's discriminatory objective without knowledge that he has done so. Compare *N.L.R.B.* v. *Auchter Company,* 209 F. 2d 273, 277 (C.A. 5). Any other rule would put a premium on successful deception, a result clearly not contemplated or intended by the Act.

The proposition here advanced is no different in essence from the view frequently urged that a finding of a Section 8 (b) (2) violation against a union is precluded unless the employer putatively responsible for the Section 8 (a) (3) violation is joined in the proceeding. As the cited cases establish (*supra,* pp. 12-13), neither proposition is valid. The facts are undisputed here that absent reference by Local 12,

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[12] Accord: *N.L.R.B.* v. *ILWU,* 210 F. 2d 581, 583-584 (C.A. 9); *N.L.R.B.* v. *Newspaper and Mail Deliverers' Union,* 192 F. 2d 654, 656-657 (C.A. 2), cited with approval in *Radio Officers,* and in turn citing with approval *National Union of Marine Cooks and Stewards,* 92 NLRB 877, 878.

applicants were precluded from access to AGC jobs. Local 12 imposed discriminatory requirements upon such access. The necessary consequence of this action was that AGC members did not hire applicants unless they were in compliance with these discriminatory requirements and a violation of Section 8 (b) (2) is plainly established. *N.L.R.B.* v. *ILWU,* 210 F. 2d 581, 584 (C.A. 9).

B. *The discrimination against Robert A. Holderby*

As shown in the Statement (pp. 8-9) Robert A. Holderby, as a member of Local 12, had been regularly referred to jobs with AGC members. When his Local 12 membership was terminated, however, Holderby was dropped from the preferred "Members" category and his regular referrals ceased notwithstanding that under the agreement his right to preference still obtained because of his prior employment history with AGC members. For reasons set forth in the preceding section, this action constituted a violation of Section 8 (b) (2) and (1) (A) of the Act. And see especially, *N.L.R.B.* v. *Alaska Steamship Company,* 211 F. 2d 357, 360 (C.A. 9).[12a]

Apart from general contentions already discussed, Local 12 argues that no discrimination can be found in Holderby's case absent proof that there were jobs available to which he would have been referred but for the

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[12a] For obvious reasons Local 12 did not invoke its union security agreement to justify its discrimination against Holderby. As shown in the Statement, p. 8, Holderby had in March pursuant to Local 12's letter made up his dues delinquency and had paid three months' dues in advance. Consequently, dues delinquency could afford no basis for the termination of Holderby's Local 12 membership in June.

removal of his name from the "Members" list. The Trial Examiner so found (R. 24). The Board, however, reached a contrary conclusion. The Board said (R. 39):

> It is clear that, for the purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. "This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act." [Citing *N.L.R.B.* v. *International Brotherhood of Boilermakers,* 218 F. 2d 299, 304 (C.A. 3).[13]

Accordingly, the Board ordered Local 12 to make Holderby whole for earnings as a result of the discriminatory deprivation of his preferred referral status. Recognizing, however, the casual and occasional nature of referrals, the Board, in accordance with its usual practice, left for determination in post-decree compliance proceedings the determination of the extent to which Holderby actually suffered a loss in earnings. *Boilermakers, supra,*[14]

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[13] Accord: *N.L.R.B.* v. *Swinerton & Walberg Co.,* 202 F. 2d 511, 515 (C.A. 9), certiorari denied, 346 U.S. 814; *Alaska Steamship, supra.*

[14] For a description of the Board's post-decree compliance proceedings see *N.L.R.B.* v. *Bird Machine Co.,* 174 F. 2d 404 (C.A. 1) and cases there cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APRIL 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

* * * * *

Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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